

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

FILE: B-208235

DATE: October 29, 1982

MATTER OF: International Medical Industries, Inc.

## DIGEST:

1. A contracting officer has no authority to award a contract to other than the lowest responsive, responsible offeror. Therefore, the acceptance of a firm's technical proposal under step one of a two step proposal does not bind the Government to accept that firm's step two bid if the bid is nonresponsive, even though the deviation from the terms of the solicitation was contained in the step one technical proposal.
2. Compliance with a mandatory minimum bid acceptance period established in an invitation for bids is a material requirement because a bidder offering a shorter acceptance period has an unfair advantage since it is not exposed to market place risks and fluctuations for as long as its competitors are. Therefore, a bid which takes exception to the requirement by offering a shorter acceptance period is nonresponsive and cannot be corrected.
3. A Standard Form 33 solicitation provision which provides that a 60-day bid acceptance period will apply unless the bidder specifies a different number of days should have been cross-referenced with another solicitation provision which provides that bids with acceptance periods of fewer than 45 days would be considered nonresponsive. The failure to cross-refer was not in this case grossly misleading and, therefore, the cancellation of the solicitation is not required.

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International Medical Industries, Inc. protests the award of a contract to Southeast Security Systems, Inc. by the Veterans Administration under invitation for bids (IFB) No. 509-38-82, the second step of a two-step advertised procurement. The Veterans Administration rejected International's bid as non-responsive because the bid designated a shorter bid acceptance period than was required by the solicitation. We deny the protest.

Request for technical proposals (RFTP) No. 509-24-82, step one of this two-step procurement, was issued for the installation of a security surveillance system at the Veterans Administration Medical Center in Augusta, Georgia. The RFTP contained the essential terms and conditions of the anticipated step two solicitation, including a required bid acceptance period of 45 days. The technical proposal that International submitted in response to the RFTP designated a bid acceptance period of 30 days. The Administration found the proposal to be technically acceptable and invited International to submit a bid under step two of the procurement. International submitted a low bid of \$84,612. The Administration rejected the bid, however, because it provided a 30-day bid acceptance period and awarded a contract to Southeast Security at a price of \$89,126.

International cites in its favor decisions in which we have held that where there is some ambiguity associated with a step two bid, a presumption of responsiveness exists with respect to the bid in view of the approval of step one proposal. See, e.g., Federal Aviation Administration, B-193238, February 27, 1979, 79-1 CPD 136. This presumption, however, is not applicable here because there is absolutely no ambiguity concerning the responsiveness of International's bid: the bid clearly deviates from the material terms of the solicitation by providing 30 days for its acceptance period.

International then concedes that its bid was non-responsive but contends that the rejection of its bid was improper because, under the doctrines of finality and equitable estoppel, the Government was bound by

the contracting officer's approval of the technical proposal it submitted in step one to accept its low step two bid with the 30-day acceptance period. We reject this contention. Two-step formal advertising is a variation of standard formal advertising procedures designed to maximize competition when available specifications are not sufficiently definite to permit competition on the basis of price only. Step one is similar to a negotiated procurement in that unpriced technical proposals are submitted for evaluation. Those offerors whose proposals are found to be technically acceptable are invited to submit bids in step two on the basis of their technical proposals and the advertised terms and conditions set forth in the step two invitation for bids. Those step two terms and conditions cannot be considered to have been modified by the step one evaluation, which is limited to consideration of what is proposed technically. Therefore, bidders must be charged with notice that the terms and conditions of a step two solicitation will govern the ultimate award, and since a step two competition is nothing more than a formally advertised procurement with the competition limited to those proposing technically acceptable approaches during step one, the standard rules of bid responsiveness and evaluation must apply.

As a general rule, a contracting officer has no authority to award a contract to other than the lowest responsive, responsible offeror; award to any other party is illegal. Redifon Computers Limited--Reconsideration, B-186691, June 30, 1977, 77-1 CPD 463. Therefore, a finding that a firm's technical proposal under step one of a two step procurement is acceptable cannot bind the Government to accept the firm's bid under step two if that bid is nonresponsive to the terms and conditions of the invitation for bid, even though the exception to the terms of the solicitation was contained in the step one proposal that was found to be acceptable. See American Telephone and Telegraph Company, B-193454, May 21, 1979, 79-1 CPD 365.

The protester next argues that the deviation should have been waived by the Administration under Federal Procurement Regulations § 1-2.405 (1964 ed.)

as a minor informality, particularly in view of the fact that the Government actually awarded the contract well within 30 days of bid opening. We have consistently held, however, that a provision in an IFB which requires that a bid remain available for acceptance by the Government for a prescribed period of time is a material requirement and that the failure to meet such a requirement renders a bid nonresponsive. See, e.g., Miles Metal Corporation, 54 Comp. Gen. 750 (1975), 75-1 CPD 145; 48 Comp. Gen. 19 (1968); compare, Professional Materials Hauling Co., Inc., B-205969, April 2, 1982, 82-1 CPD 297 (where the IFB did not establish a minimum bid acceptance period). To hold otherwise would afford the bidder that offered a shorter bid acceptance than required to obtain an unfair advantage over its competitors because that bidder is exposed to the risk of the market place for a shorter period of time and therefore is taking less risk than the other bidders. Esko & Young, Inc., B-204053, January 4, 1982, 82-1 CPD 5; Hemet Valley Flying Service Co., Inc. - Reconsideration, B-191390, July 26, 1978, 78-2 CPD 73. Mistake in bid procedures cannot be used to transform a nonresponsive bid into a responsive bid. Goodway Graphics of Virginia, Inc.-- Reconsideration, B-193193, May 19, 1979, 79-1 CPD 342. Therefore, even though the Administration actually awarded a contract within the shorter acceptance offered by International, the bid was properly rejected as nonresponsive.

Last, the protester contends that the rejection of its bid is improper because the solicitation provisions concerning the bid acceptance period are defective. The first page of the IFB incorporates Standard Form (SF) 33, "Solicitation, Offer and Award" which contained on page one the following standard language concerning the bid acceptance period:

"\* \* \* the undersigned agrees, if this offer is accepted within \_\_\_ calendar days (60 calendar days unless a different period is inserted by the offeror) from the date for receipt of offers specified above, to furnish any or all items upon which prices are set opposite each item, delivered at the designated point(s), within the time specified in the schedule."

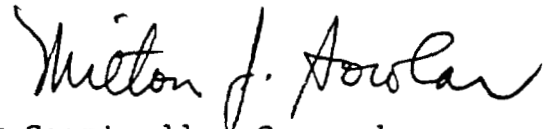
International inserted "30" in the space provided in this clause. The solicitation also contains a "Special Conditions" including at page 7, the following:

"Bid Acceptance Period:  
Bids offering less than forty-five (45)  
days for acceptance by the Government  
from the date set for opening will be  
considered non-responsive and rejected."

We have stated that where one provision of an invitation contains language specifying or inviting the designation of a bid acceptance period and another provision located elsewhere in the invitation sets forth a minimum bid acceptance period, the two provisions should be cross-referred to specifically direct the bidders' attention to the fact that the insertion of a shorter period will cause the bid to be rejected. See 47 Comp. Gen. 769 (1968); B-154793, September 21, 1964. On two occasions, we have recommended that offending solicitations be canceled. See 52 Comp. Gen. 842 (1973) and Hild Floor Machine Co., Inc., B-196419, February 19, 1980, 80-1 CPD 140. These decisions constitute an exception to the general rule that bidders are expected to scrutinize carefully the entire solicitation package, including the bid acceptance provisions, and respond accordingly. Therefore, we believe they should be narrowly construed. In both decisions the solicitations contained the same SF 33 provision used by the Administration and provided elsewhere that bids offering fewer than 90 days would be considered nonresponsive. In both cases, most bidders did not insert a number of days in the SF 33 clause and, consequently, nearly all bidders were found nonresponsive, thus depriving the Government of the benefit of competition in the procurements involved. In the course of sustaining the protests, we attached particular importance to the fact that bidders were not alerted that the two acceptance period clauses "had to be considered together and affirmative action taken with respect thereto," and that bidders were consequently ensnared into a state of nonresponsiveness. 52 Comp. Gen. 842, 845. We also stated that only a grossly misleading invitation would have caused almost all bidders to be nonresponsive.

In this case, the self-executing SF 33 period (60 days) exceeded the minimum period required (45 days). Thus, bidders were not ensnared into nonresponsiveness as they were in 52 Comp. Gen. 842, and Hild Floor Machine; rather, only by affirmative action concerning bid acceptance period could a bidder become nonresponsive. Moreover, International was the only one of the six firms that submitted bids to be found nonresponsive. Thus, although the IFB should have been cross-referenced to reduce the possibility of misinterpretation, we find that the IFB is not fatally defective.

The protest is denied. By letter of this date, however, we are recommending that the Administrator take action to ensure that bid acceptance period clauses are cross-referred in future procurements.

A handwritten signature in cursive script, reading "Milton J. Fowler".

Acting Comptroller General  
of the United States